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No. 77-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF MORALITY IN MEDIA, INC. AS *AMICUS CURIAE*

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SUBJECT INDEX

	Page
Interest of Amici	1
Summary of Argument	4
Argument	8
I. THE WORD "INDECENT" IN 18 U.S.C.1464 NEED NOT BE CONSTRUED TO BE SYNONYMOUS WITH "OBSCENE" AS USED IN MILLER v. CALIFORNIA	8
II. COHEN v. CALIFORNIA AND SIMILAR CASES DO NOT PRECLUDE PROSCRIPTION OF OFFENSIVE BUT NON-"OBSCENE" SPEECH ON THE AIRWAVES	21
III. THE RIGHT OF THE GOVERNMENT TO REGULATE INDECENT BUT NON-"OBSCENE" LANGUAGE USED ON THE AIRWAVES AS AN INVASION OF PRIVACY MAY BE BOLSTERED BY A CONCERN FOR EXPOSURE TO CHILDREN	24
IV. THE F.C.C. REGULATION IS NOT OVERBROAD	26

Page

V. THE F.C.C. REGULATION FURTHERS AN IMPORTANT OR SUBSTANTIAL GOVERNMENTAL INTEREST THAT IS UNRELATED TO THE SUPRESSION OF FREE EXPRESSION 28

Conclusion 36

TABLE OF AUTHORITIES CITED

CASES

Bell v. State, 31 Tenn.42 (1851) 19

Bread v. City of Alexandria, 341 U.S. 622 (1951) 11, 15, 18, 29, 32, 33

Brown v. Oklahoma, 408 U.S. 914 (1972) 23

Butler v. Michigan, 352 U.S. 380 (1957) 24

Cason v. City of Columbus, 409 U.S.1053 (1972) 22

Chaplinsky v. New Hampshire, 315 U.S.568 (1942) 30

Page

Close v. Lederle, 424 F.2d. 988 (1st.Cir.1970) 25

Coates v. City of Cincinatti, 402 U.S.611 (1971) 23

Cohen v. California, 403 U.S.15 (1971) 5, 20, 21, 22, 23, 28

Dillard v. State, 41 Ga.278 (1870) 19

Dupree v. State, 22 S.E.2d.33 (Ga.App.1942) 20

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 8, 9, 10, 11, 15, 23, 24, 26, 28, 29

Ginzburg v. United States, 383 U.S.463 (1966) 11, 16

Gooding v. Wilson, 405 U.S. 518 (1972) 22

Hamling v. United States, 418 U.S.87 (1974) 4, 16, 17, 18, 19

Hess v. Indiana, 414 U.S. 104 (1973) 23

Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir.1973) 22, 26

Page

Kaplan v. California,
413 U.S.115 (1973) 3

Knowles v. United States,
170 F.409 (8th Cir.1909) 19

Kovacs v. Cooper,
336 U.S.77 (1949) 10

Lehman v. City of Shaker
Heights, 418 U.S.298 (1974) 9, 35

Lewis v. City of New Orleans,
408 U.S.913 (1972) 23

Miller v. California, 4, 5, 6, 8, 11,
413 U.S.15 (1973) 16, 18, 21, 31

Papish v. Board of Curators,
410 U.S.667 (1973) 22

Paris Adult Theatre I v. Slaton,
413 U.S.49 ..... 3, 29, 30

People v. Cuomo, 335 N.Y.S.
2d 219 (N.Y.Crim.Ct.1972) ... 20

Prince v. Massachusetts,
321 U.S.158 24

Public Utililities Commission
of D.C. v. Pollack, 343 U.S.
622 11

Page

Rabe v. Washington,
405 U.S.313 (1972) 25

Redrup v. New York,
368 U.S.767 ..... 11, 25

Ricks v. State, 28 S.E. 2d 303
(Ga.App. 1943) 20

Rosenfeld v. New Jersey,
408 U.S.901 (1972) 10, 23

Roth v. United States,
354 U.S. 476 (1957) 20

Rowan v. Post Office Department,
397 U.S.728 (1970) 8, 9

Spears v. State, 337 So.2d 977
(Fla.1976) 15

State v. Boyd, 35 Ohio App.2d
147 (1972) 13

State v. Burke, 154 S.E.747
(N.Car.1930) 20

State v. Chrisp, 85 N.C. 528 .. 20

State v. Packer Corp. 297
P.1013 (Utah, 1931) 35

State v. Rabe, 79 Wash. 2d 254
(1971) 25

Page

Terminello v. Chicago,
337 U.S.1 (1949) 23

Thornley v. United States,
113 U.S.310 18

United States v. Bebout,
28 F.522 (W.D.Ohio 1886) 21

United States v. Benedict,
165 F.221 (S.D.N.Y.1908) 20

United States v. Bennett,
24 F.Cas.1090 (1879) 19, 20

United States v. Davis,
38 F.326 (W.D.Tenn.1889) 21

United States v. Loftus,
12 F.671 (D.Ore.1882) 21

United States v. Musgrave,
160 F.700 (E.D.Ark.,1908) ... 18

United States v. O'Brien,
391 U.S.367 (1968) 14

United States v. 37 Photographs,
402 U.S.367 26

United States v. 12 200 Foot 4, 16
Reels, 413 U.S.123 (1973).... 17, 18

Page

Young v. American Mini Theatre,
427 U.S.50 (1977) 25, 34

Weaver v. State,
79 Ala.279 (1885) 19

STATUTES

18 U.S.C. #1461 ..... 17, 18

18 U.S.C. #1462 ..... 16, 17
18, 19

18 U.S.C. #1464 ..... 4, 5, 7, 8,
17, 18, 19,
20, 35

19 U.S.C. #1305(a) 16, 17

Sec.326 of the Communications
Act of 1934, As Amended 36

MISCELLANEOUS

	Page
Harvard L.Rev.89:47	29
Hill Link Minority Report of the Presidential Commission on Obscenity and Pornography (1970)	3
Webster's Seventh New Collegiate Dictionary	21
Where Do You Draw The Line? Brigham Young University Press (1974)	30, 31, 34

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977
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Federal Communications Commission,
Petitioner,

v.

Pacifica Foundation,
Respondent,

ON WRIT OF CERTIORARTI TO THE UNITED STATES
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BRIEF OF MORALITY IN MEDIA, INC.
AS
AMICUS CURIAE

INTEREST OF AMICI

Morality in Media, Inc. as Amicus Curiae, files this brief in this case,

which is before this honorable Court on the merits, under the provisions of Rule 42 (2). The written consents of the petitioner and respondent have been requested and both parties have consented in writing. Copies of such consents are being filed with this Court concurrently with this brief.

Morality in Media, Inc., is a New York not for profit inter-faith charitable Corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states. It corresponds 8 times a year with over 50,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessman, clergy and civic leaders. Its national headquarters is located at 487 Park Avenue, New York, New York 10022.

The President of Morality in Media, Inc., is Reverend Morton A.Hill S.J. In 1968 Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C.Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity

and Pornography"[1]

Morality in Media, Inc., files this brief supporting the position of the Federal Communications Commission because it believes that the decision in this matter will be of grave importance to the men, women and children who comprise the listening audience of the United States and may impact just as strongly on the rights of those who comprise the audiovisual television audience.

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1. The "Hill-Link Minority Report" was cited by this honorable court in Kaplan v. California 413 U.S.115, at 120 n.4 93 S.Ct.2680, 2684 n.4, 37 L.Ed.2d 492 (1973). Paris Adult Theatre I. v. Slaton, 413 U.S. 49 at 59 n.7 and n.8, 93 S.Ct.2628 at 2635 n.7 and 8, 37 L.Ed 2D 446 (1973)

SUMMARY OF ARGUMENT

I.

Amicus contends that the definitions of "obscene" and "indecent", as used in 18 U.S.C.1464, are colored and gain meaning from the "setting" or media in which they are used; That the fact that radio communication reaches into the privacy of the home, affects children and also affects unwilling, unsuspecting (and to a degree) captive auditors, requires definitions that vary from those used by this Court in Miller v. California. In addition, Amicus argues that where, as here, the use of scurrilous language is willful and calculated to offend, a different test than Miller should be applied. Amicus points out that offensive words were used over 100 times in an eleven minute forty-five second broadcast , making it impossible for a newly tuned auditor to avoid being exposed. Amicus makes it clear that neither Hamling nor 12 200 Foot Reels has construed 18 U.S.C.1464 as requiring the application of Miller standards to radio broadcasting, but on the contrary restricted that application to other sections of the code. Finally, as to this point, Amicus notes that the word "Indecent" traditionally has had a different meaning from the word

"Obscene". Amicus then observes that the "focus" in 1464 is not on "Obscenity" but on "Obscene or Indecent or Profane Language" indicating a congressional intent thet "language" is the key word in 1464 -that the application of Miller tests would destroy the intent of the statute in this regard, since it is quite clear that "Obscene Language" and "Indecent Language" normally cannot be "Obscene" in the Miller sense.

II.

In its second argument Amicus distinguishes Cohen v. California and similar cases as being inapplicable because the privacy of the home was not being invaded.

III.

Amicus goes on to demostrate that the compelling interest of protecting the privacy of the home can be bolstered by a legitimate but limited concern for the welfare of children, where the rationale of the proscription has such mixed elements in its constitution. Under such circumstances, the contention is made that reasonable time, place and manner restrictions may be placed on the exercize of First Amendment rights.

IV.

The next point developed is the

argument that the F.C.C. restrictions or any Federal statute or regulation, is not overbroad if it can be subjected to a limiting construction. Amicus claims that it was the duty of the Lower Court and within the province of this Court to so construe the F.C.C. rules since they are capable of being so construed to avoid vagueness and overbreadth, if any.

V.

Finally, Amicus postulates that the F.C.C. Rules further substantial and compelling governmental interests unrelated to free expression. These are the prevention of intrusion into the privacy of the home, the welfare of children, the concern of parents for that welfare, the quality of life, the total community environment and the "survival of civility". It is demostrated that it is not the "expressive content" but the intrusion that is being proscribed and that the determination to make such a prohibition is bolstered by these other legitimate and "compelling" governmental concerns.

Amicus concludes that the Miller standards insofar as they permit patently offensive descriptions and

depictions, even in the presence of "serious value", are inappropriate for application to radio or to 18 U.S.C.1464 generally. In fact, Amicus claims, that such application would be intolerable to the American public.

Finally, it is observed that any requirement that a householder must "turn off the radio" or "change the station" in the privacy of his or her home, mandates an unwarranted affirmative act involving the compulsion to use the mind, the senses, the arms, the legs and most of the muscles in the body. This differs sustantially from an almost imperceptible movement of the muscle controlling the lateral motion of the eye.

ARGUMENT

I.

THE WORD "INDECENT" IN 18 U.S.C. 1464 NEED NOT BE CONSTRUED TO BE SYNONYMOUS WITH "OBSCENE" AS USED IN MILLER v. CALIFORNIA

Any study of the variable meaning of the words "Indecent" and "Obscene" as colored by the "setting" or "media" in which they are used, should begin with the pronouncements of this honorable court in Erznoznik v. City of Jacksonville,[2] since it is there that we find the distinctions that may be controlling in this case. In Erznoznik we find the following:

> "When the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power" (citing cases) ... "Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see Rowan v. Post Office Dept.[3], or the degree of

2. 422 U.S.205 (1975)
3. 397 U.S. 728 (1970)

> captivity makes it impractical for the unwilling viewer or auditor to avoid exposure..." (emphasis added)

The Erznoznik Court, in foot note 4 states relative to Rowan:

> "The Court upheld the statute, emphasizing that individual privacy is entitled to greater protection in the home than on the streets and noting that the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"

This same Court further elucidates the degree to which "Speech" may be regulated and censored when at foot note 5 it says:

> "In Lehman[4], the Court sustained a municipality's policy of barring political advertisements ... the plurality and concurring opinions recognized that the degree of captivity and the resulting intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street ..."

4. Lehman v. City of Shaker Heights, 418 U.S. 298, 305 (1974)

Again, at foot note 6, Erznoznik assists us to understand what may be proscribed as "Indecent Speech" without violating the First Amendment:

> "It has also been suggested that government may proscribe, by a properly framed law, 'The willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience'" (emphasis added) ... "Rosenfeld v. New Jersey"[5] ..."In such cases the speaker may seek to force public confrontation with the potentially offensive aspects of the work" ... "It may not be the content of the speech as much as the deliberate 'verbal (or visual) assault' Rosenfeld, supra... that justifies proscription. See Redrup v. New York"

Chief Justice Burger, in a dissent in Erznoznik, (in which Justice Rehnquist concurs) quoting from Kovacs[6] reminds us that:

> "Members of this Court have cautioned that every medium of communication 'is a law into itself'"

Erznoznik also suggests, supra, that

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5. Rosenfeld v. New Jersey, 408 U.S.901, 905 (1972)

6. Kovacs v. Cooper, 336 U.S.77 at 97 (1949)

we see Redrup v. New York, 368 U.S. 767, at 769. Adverting to that case we find the oft-quoted language reading as follows:

> "In none was there any suggestion of an assault upon individual privacy by publications in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf.Bread v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 930, 98 L. Ed.1233; Public Utilities Commission of D.C. v. Pollack, 343 U.S.451, 72 S.Ct. 813, 96 L.Ed.1068"... "and in none was their evidence of the sort of 'pandering'; which the court found significant in Ginzburg v. United States, 383 U.S.463, 86 S.Ct.942, 16 L.Ed. 2d. 31."

Amicus suggests that the lesson of Erznoznik is as follows:

"Offensive" language not meeting the three pronged test of Miller v. California[7] may be proscribed under the following circumstances:

1. Where there is a properly constructed rule evidencing a limited concern for juveniles.
2. Where there is an assault upon individual privacy by publica-

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7. 413 U.S. 15 (1973)

tion in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.
3. Willful use of scurrilous languale calculated to offend the sensibilities of an unwilling audience.
4. Where the speaker intrudes on the privacy of the home.
5. Where there is evidence of pandering.

It appears clear from the record in the instant Pacifica Foundation case that many of the elements which permit the Government to proscribe "Indecent Speech" without requiring that such speech be "obscene" in the Roth-Miller sense are present.

A. There was an assault on individual privacy in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.

This appears clear from the fact that any listener who first tuned in during almost any segment of the eleven minute forty-five second broadcast, would have his sensibilities assaulted by words commonly considered to be offensive. If the transcript of "Filty Words" (Pet.App. B p 74 to 79) is examined, we find 165 lines averaging about 10.2 words

to a line. of these 165 lines[8], 84 lines have offensive words or phrases. Pages 77 and 78 each have 24 offensive lines out of 38. If it took 11 minutes and forty five seconds for the transcript of 164 lines, each line was enunciated on the average in a 4.⅛ second time frame. Anyone tuning in his or her radio any time during the narrative described on pages 76, 77 or 78 would be assaulted during this period with an offensive word on, practically, every line. Such a time frame makes it impossible for an unwilling individual to avoid exposure. It is of no help to such a person who turns on his or her radio during this period that there was a warning at the begining of the program. No attempt was made during the playing of the record to warn unwilling individuals. Nor should a person in the privacy of his home or car be required to flip the dial. On the contrary, he has a right not to have his privacy invaded by "intrusive offensiveness" on the air waves. Compare State v. Boyd, 35 Ohio App2d 147, 300 N.E.2d 752, 759 (1972)

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8. The word S--t was used 70 times. The word F--k was used 31 times. The word C-s-k was used 2 times. The words M-f and T-t were used 2 times and the words P--s and C-t were used once. 1687 words are used in the monologue.

B. Willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.

There does not seem to be any doubt from the record that the action of WBAI was willful (Pet.App.B,72), that it was scurrilous (Pet.App.B,74 to 79), or that it was calculated to offend the sensibilities of an unwilling audience since "listeners were advised that it included sensitive language which might be regarded as offensive to some" (Pet.App.A,p.2) and the record stated that he, Carlin, had been thinking about the words you could not say on the public...airways (Pet.App.B,p.65). Pacifica itself characterized the George Carlin Album as one that was calculated to offend when it said, in response to an inquiry from the FCC, that "George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to iluminate" (Pet.App.B,p. 67). It was an unwilling audience since anyone tuning in was immediatly and continually assaulted. If they "flipped the dial" to prove their unwillingness, nevertheless the offense had been committed. It was a "fait accompli". This deliberate willful use of repeated scurrillous language amounts to conduct not just speech and may be suppressed. Cf United States v. O'Brien, 391 U.S.367 (1968). It is noted that the "speech" came from a

record which someone in WBAI "played".

C. The speaker intrudes on the privacy of the home (Cf.Pet.App.B.p 87 n 8) See Bread v. Alexandria 341 U.S. 622 (1951)

It should be observed that Erznoznik at foot note 4, supra, quoting Rowan says that:

> "Individual privacy is entitled to greater protection in the home than on the streets"

It follows then, that if "Intrusive Offensive" radio shows are invasions of the privacy of the home, then they are more easily proscribable than the use of indecent speech in public, which long has been subject to proscription by the various states. While it is time that the United States Supreme Court has reversed convictions under such statutes, "It did so, not out of any solicitude for intemperance, but because the law under which the convictions were obtained was drawn in such a way that law abiding citizens could have been convicted under it."[9]

D. Evidence of Pandering: The 'leer of the sensualist' permiates the

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9. Spears v. State 337 So.2d 977, 980 (Fla.,1976)

George Carlin album. His sole emphasis is on the sexually provocative. He sets out to be indecent. He means to provoke and titilate. Cf. Ginzburg v. United States[10]

Pacifica argues (Pet.App.A p.5) that the term "indecent" as used in Federal Statutes must always be synonymous with obscene, quoting Hamling v. United States 418 U.S. 87 (1974), and United States v. 12 200 Foot Reels 413 U.S.123 (1973) It is sufficient to say that there is no such general language in either of these cases. What the Hamling Court said (quoting 12 200 Foot Reels) at 418 U.S.113, was as follows:

> "If and when such a 'serious doubt' is raised so to the vagueness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'inmoral' as used to describe regulated material in 19 U.S.C #1305 (a) and 18 U.S. C. Sec.1462 ... we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California"...(emphasis added)

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10. 383 U.S. 463 (1966)

It needs no additional argument to note that there is no reference as to how the Surpeme Court would construe the terms "obscene" or "indecent" found in 18 U.S.C 1464. The omission was, no doubt, intentional. 12 200 Foot Reels did not construe the sections mentioned. Nor is Pacifica's case assisted by the statement in Hamling at 418 U.S.115 that

> "United States v. 12 200 Foot Reels of Film, made clear our willingnes to construe federal statutes dealing with obscenity to be limited to material such as that described in Miller"

since in this context Hamling was construing Section 18 U.S.C. 1461 (relating to mailing of obscenity) and the reference to 12 200 Foot Reels was "as noted above" to 1305 and 1462.

Again, if we refer to 418 U.S.113, we find the following:

> "Miller undertook to set forth examples of the types of material which a statute might proscribe ... as noted above, we indicated in United States v. 12 200 Foot Reels ... that we were prepared to construe the generic term in 18 U.S.C.1462 to be limited to... that specific 'hard core' sexual conduct given as examples in Miller ... we now so construe the companion provision in 18 U.S.C. 1461" (emphasis added).

It should also be noted that Hamling and 12 200 Foot Reels rely for their authenticity on Miller but Miller on two occasions draws our attention to Bread v.Alexandria,[11] where First Amendment rights were required to give way to the superior right of privacy of the home.[12]

The fact that this Court has construed 18 U.S.C.1461 and its companion statute, 18 U.S.C.1462 as proscribing only hard-core depictions or descriptions does not require similar construction of the phrase "obscene", "indecent" or "profane language" found in 18 U.S.C.1464. As was said in United States v. Musgrave[13]

> "In construing statutes, the well established rule is where the language... is clear and free from ambiguity, the duty of the court is to enforce it as it is, as there is nothing to construe. Thornley v. United States, 113 U.S.310..."

The focus in 18 U.S.C.1461 is on "obnoxiously debasing portrayals of sex" based on a consistent interpretation of that statute reaching back to

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11. 341 U.S.662 (1951)
12. 413 U.S. at 19 and 34
13. 160 F.700, 703 (E.D.Ark.1908)

United States v. Bennett[14] decided in 1879, (long before radio and T.V. were invented). Hamling[15] similarly construes 18 U.S.C.1462[16] where the court court refers to "representations or descriptions". This differs significanly from 18 U.S.C.1464 where the focus is on "Obscene, Indecent or Profane Language" The caption of 1464 is "Broadcasting Obscene Language". We are therefore not concentrating in this legislation on descriptions or depictions which must be "taken as a whole" and tested for serious value, but on the use of spoken words. Our attention is riveted on "Obscene Language", "Indecent Language" and "Profane Language". These phrases were not unknown to our common law.[17] Such phrases certainly include single

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14. 24 F. Cas.1090 (1879)
15. Hamling 418 U.S. at 112
16. Hamling at p 113-114
17. Bell v. State, 31 Tenn.42 (Tenn.1851) Dillard v. State of Georgia 41 Ga.278, (Ga.1870), Weaver v. State, 79 Ala.279 (Ala. 1885). "From time immemorial it was an offense at common law to utter obscene language in public places, near a dwelling house or in the presence of women", Knowles v. United States 170 F.409, 412 (8th Cir., 1909)

words, epithets and short phrases.[18] It appears inconceivable that a single word or short phrase "Taken as a Whole" can appeal to pruriencey and demonstrate lack of serious value.[19] The three pronged tests were built up for obscene literature[20], not "Obscene Language" or "Obscene Speech". What then are we to say, that we cannot give effect to the intent of Congress in enacting 18 U.S.C.1464 because single words cannot be prurient?

It is plain that the words "Obscene" and "Indecent" are not synonymous. "Indecent" has been variously defined as "unbecoming", "inmodest", "unfit to be seen". United States v. Bennett. The term is said to signify more than

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18. Cf. State v. Chrisp, 85 N.C.528; State v. Burke, 154 S.E.747 (No.Car.1930); Dupree v. State, 22 S.E.2d 33 (Ga.App.1942); Ricks v. State, 28 S.E.2d 303 (Ga.App.1943. Cf. People v. Cuomo, 335 N.Y.S.2d 219 (N.Y.Crim.Ct.1972)

19. "It cannot plausibly be maintained that this vulgar allusion to the selective Service System would, conjure up some psychic stimulation"... Cohen v. Cal.403 U.S.15, 20. An unspeakable and repulsive epithet could not, in any conceivable way, be said to be likely to suggest or convey lewd or lascivious thoughts. United States v. Benedict, 165 F.221 (S.D.N.Y.1908)

20. Cf. Roth v. United States, 354 U.S.476 Fn.26.

indelicate and less than immodest -to mean something unfit for the eye or ear- United States v. Loftus 12 F. 671 (D.Ore.1882); "unfit to be seen or heard", United States v. Bebout 28 F.522(W.D.Ohio 1886) "that which shocks the ordinary and common sense of men as indecency", United States v. Davis 38 F.326 (W.D.Tenn., 1889); Indecency implies great unseemliness or gross offensiveness, especially in reference to sexual matters. Websters Seventh New Collegiate Dictionary G & C Merriam Co. The word "Obscene" of course, is defined in Miller v. California.

II

COHEN v. CALIFORNIA AND SIMILAR CASES DO NOT PRECLUDE PROSCRIPTION OF OFFENSIVE BUT NON-"OBSCENE" SPEECH ON THE AIRWAVES

Cohen v. California[21] has no precedental value in the instant matter since that Court carefully noted that it was not dealing with a situation involving invasion of the

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21. 403 U.S. 15 (1971)

privacy of the home[22] (where different rules apply), nor was the issue of the privacy of the home involved in any of the following cases, where "offensive" speech was held protected:

1. Papish v. Board of Curators of University of Missouri
410 U.S.667 (1973)

2. Jacobs v. Board of School Commissioners
490 F.2d 601 (7th Cir.1973)

3. Gooding v. Wilson
405 U.S. 518 (1972)

4. Cason v. City of Columbus
409 U.S. 1053 (1972)

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22. "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannct be totally banned from the public dialogue... we have at the same time consistently stressed that 'we are often captives' outside the sanctuary of the home and subject to objectionable speech". (emphasis added) "Walking through a Courthouse ... is nothing like being free from unwanted expression in the confines of one's own home" Cohen v. California 403 U.S. at 21 (1971)

5. Rosenfeld v. New Jersey
408 U.S. 901 (1972)

6. Lewis v. City of New Orleans
408 U.S. 913 (1972)

7. Hess v. Indiana
414 U.S.104 (1973)

8. Coates v. City of Cincinatti
402 U.S.611 (1971)

9. Terminello v. Chicago
337 U.S. 1 (1949)

10. Brown v. Oklahoma
408 U.S. 914 (1972)

It may also be noted that, the remark in Cohen to the effect that in order to prohibit obscene expression, such expression must be in some significant way "erotic", has no particular application to the instant case, since the focus here is on "Indecent", not "obscene".

The Court of Appeals[23] relies heavily on Erznoznik, but that reliance insofar as the aspect of unwilling audition is concerned, may be misplaced since Erznoznik, at footnote 6, states "Appellant is not trying to reach,

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23. (Pet.App.A p.1 at 13, 14, 32 and 33)

much less shock, unwilling viewers"...

III

THE RIGHT OF THE GOVERNMENT TO REGULATE INDECENT BUT NON-"OBSCENE" LANGUAGE USED ON THE AIRWAVES AS AN INVASION OF PRIVACY MAY BE BOLSTERED BY A CONCERN FOR EXPOSURE TO CHILDREN

The state under its parens patriae jurisdiction has inherent power to regulate where the welfare of children is involved Prince v. Massachusetts, 321 U.S.158. It is also true that the state cannot reduce the adult population to reading what is only fit for children Butler v. Michigan, 352 U.S. 380. "Speech that is neither obscene as to youths, nor subject to some other legitimate proscription, cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them Erznoznik v. City of Jacksonville, 422 U.S.205, at 213(1975) (emphasis added)

Implicit in this statement of Erznoznik is the concept that a legislative body may, where speech is subject to other legitimate proscription, take into consideration the protection of youth. This concern goes

into the balance along with others and may be sufficient to tip the scale. The F.C.C., in addition to its concern for children, noted "brodcasting's uniquely intrusive qualities." In Close v. Lederle, 424 F.2d 988, 990 (1st Cir.1970) the Court, quoting Redrup, noted that the University of Massachusetts had a right to protect "assault's upon individual privacy" and the reasonableness of the University's action "was bolstered by the fact that children regularly used that particular corridor where the offensive materials had been displayed".[24] As was said in Young v. American Mini Theaters[25] "reasonable regulation of time, place and manner of protected speech where...necessary to further significant governmental interest are permitted by the First Ammendment."

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24. State v. Rabe, 484 P.2d 917, 924 Wash. Sup.Ct.(1971) reversed on other grounds sub nom. Rabe v. Washington, 405 U.S.313 (1972

25. 427 U.S. 50, 63 n.18 (1976)

IV

THE F.C.C. REGULATION IS NOT OVERBROAD

An overbroad regulation is one for which there is not a valid construction which avoids abridgement of first amendment rights.[26] A federal court may construe or interpret a federal statute or regulation to avoid vagueness or overbreadth.[27] As was said in United States v. 37 Photographs, 402 U.S.363, at 369;

> "We must remember that when the validity of an act of Congress is drawn in question and a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible where the question may be avoided..."

If there are infirmities in the F.C.C. Regulation, or in the meaning

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26. Jacobs v. Board of School Commissioners S.490 F.2d 601, 605 (7th Cir.1973)

27. Id. a Page 606 Cf. Erznoznik at 422 U.S.205, 216 (1975)

of the statute, which require construction, this Court may apply such a construction as will eliminate problems of vagueness and overbreadth. It could, for example, construe the meaning of the word "children" and the phrase "when the number of children in the audience is reduced to a minimum".

In addition it might formulate a four pronged test for "Obscene" and "Indecent Language for Broadcasting" perhaps as follows... "The test shall be,

(a) A deliberate use
of
(b) Language or words describing sexual or excretory organs or functions which are
(c) Grossly offensive to generally accepted standards of decency for the Broadcast media and have been
(d) Specifically so declared by Federal Communications Commission Rules, Regulations or Decisions or by Federal Law as written or construed."

Such a "test" as Amicus suggests, may perhaps avoid any overbreadth and, at the same time, avoid the dilemma

posed in Cohen[28] of "boundlessness" due to lack of criteria to determine what words may be banned. Here too, the number of words restricted under the suggested test, would, probably, be limited to the ten found in the Carlin Album that fit the test.[29] Surely, this is a small price to pay for the survival of civility. Such a test would not be subject to the infirmity found in Erznoznik of innocent depictions of nudity. In Cohen, the only conduct the state sought to punish, was the act of communication. In Pacifica, it is the deliberate intrusion into the home that forms the basic rationale of the proscription, in addition to the protection afforded to youth.

V

THE F.C.C. REGULATION FURTHERS AN IMPORTANT OR SUBSTANTIAL GOVERNMENTAL INTEREST THAT IS UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION

Various of the governmental interests spelled out to justify

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28. Cohen v. California 403 U.S. 15, 25

29. These words are S-t, F-k, M-f, P--s, C-s, T-t, C-t, T-d, t--T and F-t. (Pet.App. B p.74 to 79)

the validity of obscenity legislation, are equally applicable to "Indecent" Broadcasting. These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers and possibly, the public safety itself, see Paris Adult Theatre I v. Slaton 413 U.S.49, at 58.

"Rights and interests other than the advocates are involved." Bread v. Alexandria. 342 U.S.622 (1951). In Erznoznik the rights of the audience to attend a motion picture of their choice was involved. In Pacifica, that audience is the American listening public. The law protects the home against unwanted intrusions and not just intrusions by expressive language.[30]

Slaton quotes Professor Alexander Bickel to the effect that

> "Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear, (which in truth we cannot) what is commonly read and seen and heard and done intrudes upon us

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30. Cf. The Supreme Court 1974 Term, Harvard Law Rev.Vol.89:47 p.129 F.n.53

all, wanted or not..."[31]

Professor Bickel, in 1974 writing, in "Where Do You Draw the Line?",[32] elaborated on this thought when he wrote:

> "Even speech, which advocates no ideas, can have its consequences. It may inflict injury by its very utterance as the Court said a generation ago, in the Chaplinsky case of lewd or profane or fighting words. More and equally important, it may create a climate, an environment in which, conduct and actions that were not possible before, become possible"

Irving Kristol writing in the same publication[33] puts it thus

> "What is at stake is civilization and humanity, nothing less.. the matter of obscenity and pornography is not a trivial one."

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31. Paris Adult Theatre I v. Slaton 413 U.S. at 59.

32. Brigham Young University Press, Edited by Victor B.Cline (1974) at page 72.

33. Id. at page 51 -see also reference to "Where Do You Draw the Line"- in Petitioner's Appendix B, page 90.

Mr. Kristol also says:

> "It is no accident that in the history of all literatures, obscene words -the so called- 'four letter words', have always been the vocabulary of farce or vituperation. The reason is clear, they reduce men and women to some of their mere bodily functions -they reduce men to his animal component- and such reduction is an essential purpose of farce or vituperation."

The last quotation we shall take from Where Do You Draw the Line?, is from an article entitled "Obscenity Law and the Supreme Court", written just after the Miller decision, reading as follows:

> "Literally, the quality of lack of serious value, which obscenity must have means, that even where you have pruriency (appeal to lust), and patently offensive hard-core sexual conduct specifically defined, it is legal to publish or present it, if the work has serious literary or artistic

value. Let us now apply that concept to a form of media, for example, television (in color). Does not the Supreme Court opinion say that you can present explicit hard-core sex or bestiality on T.V. if, the 'play' or 'film' or 'live performance' has literary or artistic value? It would appear that most Americans, obviously would not tolerate this. While they might tolerate these distinctions in books, magazines, or even motion pictures, they would not tolerate the concept that they must switch the dial to avoid such performances on T.V. or radio or that they must be concerned that their minor children may be exposed to the Same."

"From this exposition, it is quite obvious that different standards must be applied to T.V., radio ... Television and radio communications, certainly partake of the nature of a public access thoroughfare (albeit an electromagnetic one), and what may be prohibited on the public street should be equally prohibited on T.V. and radio. ... These programs come into the home, and under the doctrine of Bread v. Alexandria,

341 U.S.622 (1951), the usual broad play afforded free speech may be curtailed... The new definition of obscenity cannot be practically or feasibly extended to radio or T.V. in its present form."

"What is the quality in public nudity that permits the law to inhibit it without proof of obscenity? ... We suggest that the quality involved is "Intrusiveness" (as in Bread). Where this quality is present, obscenity vel non need not be proved. Just as a citizen is entitled to walk down the public street without the necessity of having to avert his eyes to avoid a public nude performance so too he is entitled to 'flip the dial' without viewing intrusive nudity or explicit hard-core sex. Is he supposed to review the program for 30 minutes or one hour to determine if the work 'taken as a whole' has artistic, literary, political or scientific value? Most probably, the Supreme Court did not intend this result and is awaiting the opportunity to correct this deficiency as soon as a proper case in this area presents itself for adjudication. In the meantime,

we are left with this anomaly."[34]

It is observed in passing that in protecting the compelling interests, the F.C.C. has intruded on normal First Amendment Rights only to the extent necessary to achieve the desired protection. It has not banned scurrilous speech from the "Air-ways" entirely, it has established time, place and manner regulation. Reasonable regulation of the time, place and manner of protected speech where these regulations are necessary to further significant governmental interests, are permitted by the First Amendment.[35] The banning of "Ten Dirty Words", will not have a "significant deterrent effect" on the presentation of programs protected by the First Amendment -see American Mini Theatre- 427 U.S.50, at 60.

It is intolerable to suggest that a householder or parent or child must change the station. Does this affirmative act, this bow to the triumph of scurrility, really further

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34. Where Do You Draw the Line, p.102-103 -Article by Paul J.Mc.Geady, Esq.,- of Counsel on this Brief.

35. Young v. American Mini Theatre, 427 U.S.at 63 n.18.

respect for the First Amendment? The reference in the Circuit Court below, concurring opinion, to Lehman v. Shaker Heights[36] to the fact that the "radio can be turned off" cannot by any stretch of the imagination be considered a precedent or a pronouncement of the United States Supreme Court that an auditor of a radio program or the viewer of a T.V.program must avert his ear or eye. An examination of Lehman shows that this quotation originated with the case of State v. Packer Corporation 297 P. 1013, 1019 (1931) and had nothing to do with 18 U.S.C.1464 or radio, but related to the regulation of tobacco advertising and was used to illustrate the simple fact that it is possible to turn off radio advertising but not so billboard advertising. This was its only purpose and it is valueless as a precedent in the instant case.

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36. Pet.App.A p.15

CONCLUSION

For the foregoing reasons, the decision in the United States Court of Appeals for the District of Columbia is erroneous. The F.C.C.did not violate Section 326 because such prohibition refers only to interference with "the right of free speech by means of radio communication." Such did not occur in this case, nor is F.C.C. Regulation vague or overbroad, since a Federal Regulation is not such if the Federal Courts may, by appropriate construction, avoid that result. The Lower Court should have used its powers to accomplish that end.

The Circuit Court should be reversed and the case remanded for further proceedings, not inconsistent with the opinion of this Court.

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